

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HEALTH**

In the Matter of Broadway Food Market  
WIC Vendor No. 0041

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

Administrative Law Judge Steve M. Mihalchick conducted a hearing in this contested case proceeding on Tuesday, October 27, 1998, at 9:30 a.m., in the St. Croix Room, Minnesota Department of Health Service Center, 1645 Energy Park Drive, St. Paul, Minnesota. The record closed on November 30, 1998, when the Administrative Law Judge received the final letter from Broadway Food Market saying it would not be submitting a reply brief.

Wendy Willson Legge, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared at the hearing on behalf of the Minnesota Department of Health. Edward F. Kautzer, Attorney at Law, Suite 510, Spruce Tree Centre, 1600 University Avenue West, St. Paul, Minnesota 55401-3829, appeared at the hearing on behalf of Broadway Food Market.

**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minnesota law,<sup>[1]</sup> the Commissioner may not make the final decision until after the parties have had access to this report for at least ten days. During that time, the Commissioner must give each party adversely affected by this report an opportunity to file exceptions and present argument. Parties should contact the office of Anne Barry, Commissioner of Health, 717 Delaware Street Southeast, Minneapolis, Minnesota 55440, to find out how to file exceptions and present argument.

**STATEMENT OF ISSUES**

1. Whether Broadway Food Market charged the WIC Program for foods not received by an undercover investigator or charged the WIC Program more than the store's usual and customary charge for the foods received by the undercover investigator.
2. If so, whether such action constitutes a violation of Broadway Food Market's WIC vendor agreement and Minnesota Rules.

3. If so, whether a one-year disqualification of Broadway Food Market from the WIC Program is appropriate.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. Broadway Food Market (Broadway) is a grocery store located at 2130 West Broadway, Minneapolis, Minnesota. The current owners of the store are Khaldoun Obeidat and Bill Gorham.<sup>[2]</sup> At least one other person assists in the operation of the store, including operating the cash register.<sup>[3]</sup>

2. The Special Supplemental Nutrition Program for Women, Infants and Children (WIC Program) provides pregnant women, nursing mothers, infants, and children up to the age of five with nutritional supplements and other health care services. The WIC Program provides participants with vouchers to purchase specifically selected foods from authorized vendors.<sup>[4]</sup> The vendor fills in the amount charged for the foods listed on the voucher purchased by the participant, then deposits the voucher with the vendor's bank, in the same manner as a personal check.<sup>[5]</sup>

3. Broadway was a vendor in the WIC Program in 1997 and 1998. On March 10, 1998, Freddie Marsh-Lott, WIC Manager for the Department, sent Broadway's then sole owner, Mr. Obeidat, a letter restating the result of a store visit that took place on March 9, 1998. The letter informed Broadway that the Department had information that Broadway had been violating several provisions of the WIC Program rules. A notice of such information had been required before a vendor could be disqualified under the old rules of the WIC Program.<sup>[6]</sup> (The old rules have since been repealed.) The letter served as the required notification that store cashiers were committing several WIC violations:

- a. Providing unauthorized foods in lieu of the WIC allowed foods authorized on the program.<sup>[7]</sup>
- b. Entering a price on the voucher before the voucher was signed by a participant or proxy.<sup>[8]</sup>
- c. Entering a price on the voucher which was greater than the amount of the food items purchased.<sup>[9]</sup>

In addition, WIC approved foods at Broadway were not priced and WIC approved foods were on the shelves beyond their expiration dates.<sup>[10]</sup>

4. On May 30, 1998, Khaldoun Obeidat signed a "Retailer Vendor Agreement for Vendors Located in Tier 1 Counties" as Broadway's sole owner.<sup>[11]</sup> The effective dates of the new agreement were from May 1, 1998 to April 30, 2000.<sup>[12]</sup> The agreement was subject to the new rules.<sup>[13]</sup> Broadway was issued WIC stamp number W7787.<sup>[14]</sup>

5. Retail Food Vendor Agreements, also known as Guarantees, require that transactions between vendors and individual participants occur in certain ways.<sup>[15]</sup> By signing the Guarantee, Broadway was obligated to follow the provisions as a condition of maintaining the status of WIC authorized vendor. Among the relevant provisions contained in the Guarantee are:

The vendor shall charge the WIC program only for items received by a WIC customer.<sup>[16]</sup>

The Vendor shall not charge the WIC Program more money for an item than the Vendor's usual and customary charge for that item.<sup>[17]</sup>

The Vendor shall not provide in exchange for a voucher any expired or damaged WIC-allowed food item.<sup>[18]</sup>

For each voucher accepted by the Vendor, the Vendor shall ensure that:

(3) the price of the food purchased with the voucher is inserted in the space provided on the voucher before the WIC customer signs the voucher;<sup>[19]</sup>

\* \* \*

(5) the cashier verifies that the signature of the individual who signs the voucher matches an authorized signature on the WIC authorization folder;<sup>[20]</sup>

The Vendor shall submit to the commissioner a written notice of any change of ownership, any change of name, and any change of business site...<sup>[21]</sup>

The commissioner shall disqualify the Vendor if the Vendor commits a Class A violation...

(1) charging the WIC program for items not received by a WIC customer;

\* \* \*

(12) charging the WIC program more money for an item than the Vendor's usual and customary charge for that item.<sup>[22]</sup>

The commissioner shall sanction the Vendor if the Vendor committed one or more Class B violations...

(2) except as specified in section XI(A)(3) of this agreement, providing any food other than WIC-allowed food in exchange for a voucher;<sup>[23]</sup>

6. On June 5, 1998, Billy Gorham signed a new "Retail Food Vendor Agreement for Vendors Located in Tier 1 Counties" as Broadway's co-owner.<sup>[24]</sup> Mr. Gorham had joined Mr. Obeidat as co-owner of Broadway Foods in May, 1998, and that ownership arrangement continues to the present. The term of the new agreement runs from May 1, 1998 to April 30, 2000.<sup>[25]</sup> The new agreement was subject to the new

rules.<sup>[26]</sup> Broadway returned its old WIC stamp and was issued WIC stamp number 0041.<sup>[27]</sup>

7. The Department's agents conduct compliance buys according to predetermined standard operating procedures, which included the following: An undercover agent and a compliance specialist drive to a location near the store, where they park the car. Prior to arrival the investigator completes section A of the Report of WIC Investigation form. Once parked, the compliance specialist completes part of Section B2 and Section C of the Report of WIC Investigation form.<sup>[28]</sup> The compliance specialist then gives a voucher and WIC identification card, both with a fictitious identity, to the undercover agent. The undercover agent walks to the store and makes the undercover buy. After the buy the undercover agent walks back to the car, and completes Section B1.<sup>[29]</sup>

8. The Department has also established standard operating procedures to govern what an investigator should do after entering a WIC vendor's store. Upon entering, the investigator collects food items and takes them to the cashier to be rung up. The foods that the investigator brings to the cashier commonly include some items that are not specifically approved by the WIC program. Additionally, the investigator commonly omits some food item described on the WIC voucher. The investigator then presents the WIC voucher to the cashier. It is the responsibility of the cashier to record the total price on the voucher for the foods presented for purchase before returning the voucher for the investigator's signature. The investigator does not produce the WIC identification card for comparison of signatures unless requested. After signing the WIC voucher and returning it to the cashier, the investigator allows the cashier to bag the groceries and leaves the store, proceeding directly to the car where the compliance specialist is waiting.<sup>[30]</sup>

9. The Department's standard operating procedures for compliance buys also covers what occurs when the investigator returns to the car with the bag or bags of groceries. The compliance specialist records the time the investigator returned to the car. He or she then prepares a written inventory of the food items that the investigator bought from the store. A slip of paper is placed in each bag of groceries identifying the WIC vendor from which the items were purchased. The investigator and the compliance specialist complete a written report of the results of their investigation. Care is given to ensure that the food items are kept separate from any food items that may have been purchased from other vendors that same day.<sup>[31]</sup>

10. Food items purchased during a compliance buy are donated to a charitable institution either that day or, if the charity is not open, the items are donated the next day. If the items are not donated until the next day, the perishable food items are kept in a separate bag, along with the slip of paper identifying the store from which it was purchased, in the compliance specialist's refrigerator.<sup>[32]</sup>

11. Before donating the food items, photographs are taken of the food items that were purchased from the vendors.<sup>[33]</sup> The Item Donation sheet is completed and compared to section D of the investigation report.<sup>[34]</sup> Generally, both the undercover

investigator and compliance specialist both donate the food. However, if the food is being donated the next day, the compliance specialist will donate the food items, take the photographs and complete the form alone.<sup>[35]</sup>

12. On June 21, 1998, an undercover agent and Freddie Marsh-Lott conducted an undercover buy from Broadway. The compliance buy followed the Department's standard operating procedures as described above. The only change made by the Department to its standard operating procedures was that the undercover buy was observed by a trainee undercover agent.<sup>[36]</sup>

13. Accompanied by the trainee, the undercover agent entered Broadway with a WIC voucher to pay for food, and a WIC ID folder, but with no other means of payment.<sup>[37]</sup> The voucher used by the undercover agent for payment listed 36 ounces of WIC-approved cereal, one gallon of milk, one pound of WIC-approved cheese, one dozen eggs, 18 ounces of peanut butter, and two 46 ounce cans of 100% fruit juice or four six ounce cans of 100% frozen fruit juice.<sup>[38]</sup>

14. During the purchase, the undercover agent attempted to purchase Fruit Loops, which is not a WIC-approved food item. However, the clerk at Broadway informed the undercover agent that Fruit Loops were unauthorized. The undercover agent instead selected Cheerios, an authorized cereal.<sup>[39]</sup>

15. In return for the voucher, the undercover agent purchased two 15-ounce boxes of Cheerios, one dozen eggs, one gallon of milk, and two 12-ounce cans of frozen grape cocktail. The undercover agent did not obtain any peanut butter or cheese.<sup>[40]</sup> The clerk wrote \$28.22 as the total on the voucher in the presence of the investigator.<sup>[41]</sup>

16. The undercover agent walked back to the car, one block from Broadway. The investigator and compliance specialist followed the standard operating procedure for accounting after a compliance buy.<sup>[42]</sup> The groceries were placed in the back seat. A slip of paper with Broadway's name on it was placed in each bag. The undercover agent and the compliance specialist prepared a written inventory of the food items that the investigator bought from the vendor. The investigator and the compliance specialist complete a written report of the results of their investigation.<sup>[43]</sup> Care was given to ensure that the food items were kept separate from any food items that had been purchased from other vendors during that same day.<sup>[44]</sup>

17. On July 9, 1998, the Department conducted another compliance buy at Broadway. During this undercover buy, the undercover agent purchased grape cocktail and not grape juice. During the undercover buy, the Broadway clerk commented to the undercover agent that she did not buy cheese and spoke to another store employee about this. No cheese was purchased and no charge was assessed for the cheese.<sup>[45]</sup> The Department did not bring any charge of violations against Broadway for the improper food (the grape cocktail) sold to the investigator.

18. On August 28, 1998, a Department compliance specialist went to Broadway and completed the Competitive Price Check Worksheet.<sup>[46]</sup> The purpose of the worksheet is to monitor the store's price information. Once at the store, the compliance specialist enters the store and informs a store representative that the visit is for the purpose of monitoring. The compliance specialist, using the form, checks and records prices of items purchased during the previous compliance buys. If a price for a particular item is not listed, the compliance specialist asks the store representative for that information.<sup>[47]</sup>

19. The information obtained on the August 28 monitoring of Broadway was compared to the June 21 undercover buy conducted at Broadway. From this comparison the compliance specialist determined that the value of the food obtained by the undercover agent during the undercover buy, at Broadway's usual and customary prices, was \$17.90.<sup>[48]</sup>

20. A representative of Broadway stamped the WIC voucher with Broadway's vendor stamp.<sup>[49]</sup> WIC voucher number 47024964 was paid from the Minnesota WIC Program's bank account in the amount of \$28.22 on June 25, 1998.<sup>[50]</sup> The WIC voucher used in the June 21 compliance buy was processed for payment by the Department's bank and returned to the compliance specialist. Based on the prices recorded on the August 28 visit to Broadway<sup>[51]</sup> and another worksheet completed by Marsh-Lott,<sup>[52]</sup> the food value totaled \$17.90. Broadway's redemption of WIC voucher number 47024964 was for more than the value of the food purchased.<sup>[53]</sup>

21. On September 1, 1998 Marsh-Lott sent Rick Chiat, WIC Vendor Supervisor, a memo recommending that Broadway be disqualified. His recommendation was based on the overcharge on WIC voucher number 47024964, which is classified as a Class A violation.<sup>[54]</sup> The recommendation was for a one-year disqualification period which was based on the two possible Class A violations committed on the June 21 compliance buy.<sup>[55]</sup> The Class B and C violations were not used to calculate the length of disqualification. Rick Chiat agreed the vendor should be disqualified and indicated that agreement in a memo returned to Marsh-Lott on September 3, 1998.<sup>[56]</sup>

22. On September 3, 1998, Marsh-Lott sent Broadway a letter informing it of the disqualification due to a Class A violation. Along with this letter was the Appeal Procedure Fact Sheet.<sup>[57]</sup> Specifically the letter stated that "[a]t the time of the compliance buy a store employee charged the WIC Program for items not received; or in the alternative charged the WIC Program more money for those items purchased than Broadway Food Market's usual and customary charge for those items."<sup>[58]</sup> This is a Class A violation under Minn. R. 4617.0086, subp. 3(A), and 3(L).

23. Notice of two Class B violations was provided in the September 3 letter.<sup>[59]</sup> The first Class B violation was alleged to have occurred on July 9 when the investigator was able to purchase grape cocktail which was not a WIC approved item.<sup>[60]</sup> The second Class B violation was alleged to have occurred on August 28 during the

monitoring visit when the compliance specialist found that the "... vendor was not maintaining the required stock levels for infant formula and milk."<sup>[61]</sup>

24. Notice of two Class C violations was provided in the September 3 letter to Broadway.<sup>[62]</sup> The first occurred on June 21, 1998, when the investigator purchased (with a WIC voucher) milk that bore an expiration date of June 19, 1998. During the monitoring visit of August 28, 1998, the compliance specialist found two boxes of Wheat Chex cereal that bore the expiration date of November 15, 1997. Both instances of food bearing expired dates constitute Class C violations.<sup>[63]</sup> Neither the Class B nor Class C violations was included in the disqualification of Broadway.<sup>[64]</sup>

25. By letter dated September 11, 1998, Broadway appealed the Department's disqualification, and this contested case proceeding ensued.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Administrative Law Judge and the Commissioner of the Minnesota Department of Health have jurisdiction in this matter pursuant to Minn. Stat. § 14.40, 7 C.F.R. § 246.18, and Minn. R. 461.0100, subp. 1.

2. The Notice of Hearing was proper in all respects and the Department has complied with all other substantive and procedural requirements of law or rule.

3. Minn. R. 4617.0086, subp. 3 provides in relevant part:

Itemization of Class A violations....

A. charging the WIC program for items not received by a WIC customer;

\* \* \*

L. charging the WIC program more money for an item than the vendor's usual and customary charge for that item;

4. The Department has the burden of proving by a preponderance of the evidence that Broadway Food Market violated its guarantee and WIC Program rules and that such violations support disqualification of Broadway Food Market from participating in the WIC Program for one year.

5. Broadway Food Market violated its vendor agreement and the Minnesota Rules either by charging the WIC program for foods not received by an undercover investigator or by charging the WIC program more than the store's usual and customary charge for the foods received by the undercover investigator. This violation is a Class A violation under Minn. R. 4617.0086, subp. 3.

6. Minn. R. 4617.0086, subp. 2A, provides for disqualification for one year for a vendor's first Class A violation.

### **RECOMMENDATION**

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Health AFFIRM the disqualification of Broadway Food Market from the WIC Program for one year.

Dated this 23<sup>rd</sup> day of December 1998.

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STEVE M. MIHALCHICK  
Administrative Law Judge

Reported: Tape Recorded (three tapes); No Transcript Prepared.

### **NOTICE**

Under Minnesota law,<sup>[65]</sup> the Commissioner of Health is required to serve her final decision upon each party and the Administrative Law Judge by first-class mail.

### **MEMORANDUM**

Broadway argues that willfulness must be proven as an element in finding a violation of the WIC Program rules.<sup>[66]</sup> The Minnesota WIC rules do not require the commissioner to prove that a Class A violation was willful or intentional. Moreover, although Broadway was operating under a new agreement when it received its September 3, 1998 notification, Broadway was owned by one of the two current owners, Khaldoun Obeidat, when Broadway received the March 10, 1998 letter from the Department. The March 10, 1998 letter expressly warned Broadway that entering a price on a voucher which was greater than the usual and customary amount for the food items purchased was a Class A violation and that such a violation results in a one-year disqualification. The subsequent overcharging of the WIC Program is evidence of willful or intentional behavior by Broadway.

In the June 21 compliance buy, the clerk entered \$28.22 on the voucher in the presence of the investigator. Broadway's prices for all the food listed on the voucher total \$28.22. The clerk knew what the correct total amount was for all the food on the voucher, and entered that amount without totaling the actual purchases. This is evidence that a practice existed at Broadway to charge the maximum amount possible on the voucher, regardless of the food actually purchased by the participant.



The process of visits to Broadway is asserted to be improper because the Department did not in some fashion credit Broadway for the other visits finding no "violations meritorious of disqualification."<sup>[67]</sup> Broadway misinterprets the purpose of the subsequent visits. The monitoring visit on August 28 was intended to collect information by which the existence of a violation could be confirmed. The second undercover buy was for the purpose of determining whether the one-year disqualification or a more severe disqualification was the appropriate penalty<sup>[68]</sup>.

Broadway was merely notified of Class B and Class C violations. Broadway suggested that it should have been given notice of the Class A violation to allow Broadway to "self-correct."<sup>[69]</sup> Such notice and opportunity to correct are expressly provided for in Class B and Class C violations, where the breaches are more technical and less serious. Class A violations are, by definition, more serious. The difficulty of proving a Class A violation and the standards followed for investigating vendors provide assurance that vendors are not disqualified from the WIC Program for isolated occurrences.<sup>[70]</sup> No notice of prior violations is required for Class A violations. As discussed above, Broadway was made aware of the Department's information about possible overcharging at the store in March, 1998. That was the appropriate time for self-correction, not after a compliance buy.

The notice of the violation cited as the reason for disqualification described two different types of conduct. The conduct supporting the disqualification was described as either charging the WIC program for items not received by a WIC customer or charging the WIC program more money for an item than the Vendor's usual and customary charge for the items. Broadway objects to the form of the notice of violation in the alternative as depriving the vendor of notice of what conduct violates the WIC Program standards.

One of two things occurred during the compliance buy on June 21, 1998. Either the total amount charged on the WIC voucher by Broadway included the price of peanut butter and cheese not provided, or the cost of each item that was provided was far in excess of Broadway's usual and customary price. It seems most likely that the cashier added in the prices for the unpurchased items, but it is impossible to know with certainty which of those two things occurred during that compliance buy. Which violation occurred is immaterial, since the net result of each act is the same. In either instance, the WIC Program was overcharged. Alleging the violation in the alternative is needed in these types of enforcement matters to notify vendors of the improper conduct of whichever sort that was engaged in. Broadway knows what its procedures were and could prepare its defense with full understanding of the charges. There is no failure of notice to Broadway by alleging the violation in the alternative.

During the hearing, Broadway brought up the possible hardship to participants who would have to travel farther to use WIC Program vouchers if Broadway was disqualified as a vendor. Broadway is located on a bus line that serves two other authorized vendors. The hardship provisions are intended to protect participants who would otherwise be unable to use WIC Program vouchers. The hardship provisions of Minnesota WIC rules<sup>[71]</sup> are inapplicable here.

Broadway committed a Class A violation by overcharging the WIC Program for food provided in exchange for a voucher. This is the first documented Class A violation by Broadway. Under the rules of the WIC Program, the first Class A violation requires disqualification for one year. For that reason, disqualification of Broadway from the WIC Program for one year was appropriate.

S.M.M.

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- [1] Minnesota Statutes, section 14.61 (1996).  
[2] Exs. 3 and 18.  
[3] Testimony of Thompson.  
[4] Ex. 2, at 2.  
[5] Ex. 2, at 3.  
[6] Testimony of Marsh-Lott; Ex. 21.  
[7] Minn. R. 4617.0085, subp. 2 (C)(5).  
[8] Minn. R. 4617.0085, subp. 2 (B)(8).  
[9] Minn. R. 4617.0085, subp. 2 (C)(6), (8).  
[10] Ex. 21.  
[11] See Ex. 4.  
[12] Id. at 9.  
[13] See Minn. R. 4617.0120, sups. 2(A), 6 (1997).  
[14] Ex. 5.  
[15] Ex. 3.  
[16] Id. at III B at 3.  
[17] Id. at III F, at 4.  
[18] Id. at III L at 4.  
[19] See XI C(3).  
[20] IIIN.  
[21] VIII A. Failure to do so is a Class B violation XI B (6).  
[22] Ex. 3 at 10.  
[23] XI B (2).  
[24] See Ex. 3.  
[25] Id. at 9.  
[26] See Minn. R. 4617.0120, sups. 2(A), 6 (1997).  
[27] Ex. 5.  
[28] See Ex. 11.  
[29] Testimony of Thompson and Marsh -Lott.  
[30] Testimony of Thompson.  
[31] Testimony of Thompson and Marsh-Lott.  
[32] Testimony of Marsh-Lott.  
[33] See Ex. 13 for example.  
[34] See Ex. 14 for example.  
[35] Testimony of Marsh-Lott.  
[36] Testimony of Marsh-Lott and Thompson.  
[37] Testimony of Thompson.  
[38] See Ex. 12.  
[39] See Testimony of Thompson ; Ex. 11 and 13.  
[40] See Testimony of Thompson and Marsh-Lott; Exs 11, 13,14.  
[41] Testimony of Thompson; Ex. 11.  
[42] Testimony of Marsh-Lott and Thompson.  
[43] Ex. 11; Testimony of Marsh-Lott and Thompson.  
[44] Testimony of Thompson and Marsh-Lott.

- [45] Testimony of Thompson and Marsh-Lott; Ex. 20.
- [46] Marsh-Lott Testimony; Ex. 16.
- [47] Testimony of Marsh-Lott.
- [48] See Exs. 15, 16, 11 (p. 3); Marsh-Lott Testimony.
- [49] See Exs. 9 and 12.
- [50] Ex. 12 and Testimony of Marsh-Lott ; see Ex. 9.
- [51] Ex. 16.
- [52] Ex. 15.
- [53] Exs. 15, 16, and 12.
- [54] Testimony of Marsh-Lott and Ex. 17.
- [55] Minn. R. 4617.0086, subp. 2 (A).
- [56] Ex. 17.
- [57] Marsh-Lott Testimony and Ex. 18.
- [58] Ex. 18.
- [59] Ex. 18.
- [60] Minn. R. 4617.0086, subp. 4(B).
- [61] *Id.* at subp. 4(H).
- [62] Ex. 18.
- [63] *Id.* at subp. 5(L).
- [64] Ex. 18.
- [65] Minnesota Statutes, section 14.62, subdivision 1.
- [66] Broadway Brief, at 6-7 (citing *In Re the Matter of Whitney's Market*, 1998 WL 15911 (Minn. App. 1998), *rev. denied*, March 19, 1998).
- [67] Broadway Brief, at 2.
- [68] Minn. R. 4617.0086, subd. 2 (" For each additional Class A violation committed by the vendor, the commissioner shall disqualify the vendor for the maximum period authorized in Code of Federal Regulations, title 7, section 246.12 (k)(1)(ii), as amended.").
- [69] Broadway Brief, at 3.
- [70] Broadway introduced evidence that vendor overcharges not documented as part of a Department investigation are resolved through disallowance of the individual voucher, not disqualification of the vendor. See Ex. 23.
- [71] Minn. R. 4617.0069, subp. 1.